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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1966

No. 216

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**ALLIS-CHALMERS MANUFACTURING COMPANY AND
INTERNATIONAL UNION, UAW-AFL-CIO (LOCALS
248 AND 401)**

**BRIEF FOR ALLIS-CHALMERS
MANUFACTURING COMPANY**

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**BRIEF FOR ALLIS-CHALMERS
MANUFACTURING COMPANY**

STATEMENT OF THE CASE

The necessary and relevant facts of this case were fully stipulated.

During the economic strikes in 1959 and 1962 by the local unions herein involved, the Company maintained its "open-door" policy of permitting to work those employees who elected to refrain from striking. (R. 27, 29) Some employees worked during these strikes. (R. 27, 29) The Company neither hired replacements for the striking employees (R. 27, 29) nor interfered with the right of employees to strike, or not to strike.

About three weeks after the 1959 strike began, Local 248 threatened employees with fines of \$100 for each day worked during the strike.¹ (R. 42) The strike continued for about eight weeks thereafter. (R. 27)

At the conclusion of each strike, each employee who worked was fined up to \$100 by the local unions herein involved (R. 28, 31). State court actions were instituted by such locals to collect the fines, (R. 28, 31) as permitted by the existing Wisconsin precedents.²

For the purposes of this proceeding it was stipulated that all non-probationary employees in the bargaining units represented by the local unions herein were members of such locals pursuant to union security provisions of the parties' labor agreements. (R. 26, 31)

Upon the foregoing facts, the Court of Appeals for the Seventh Circuit, sitting *en banc*, resolved the central, basic and important question presented by this case.

Although the Court below properly found no need to explore other extraneous issues raised by the Board, the recital of some additional facts is necessary for purposes of clarification here of certain allegations made by the Board and Union in their briefs.

1. The employees and local unions herein involved deemed the 1955-58 Company/union labor agreements (the first to contain a full union shop pro-

¹ The International Union (Brief, pp. 13-14) now asserts that such a threat would not have been enforced under the constitution, claiming that the maximum any employee would be fined is \$100. The report of the local union trial committee (R. 49) leaves no doubt that it believed a \$100 per day fine was possible and the trial committee considered imposing larger fines. The Union's current rationale on this point represents an approach which must come as a surprise as much to the Local Union as to the threatened employees.

² *Auto Workers, Local 756 v. Woychik*, 5 Wis. 2d 528, 93 N.W. 2d 336.

vision) to require *all* nonmembers to become members. (R. 56, 58, 62) In the state court collection case against Benjamin Natzke counsel for Local 248 was willing to stipulate that the defendant Natzke "became a member of the plaintiff union because it was required as a condition of employment." (R. 55) Even where previous non-members, pursuant to the union shop provision, executed only an authorization for check-off of dues, Local 248 treated them as having applied for and having obtained full regular union membership. (R. 57, 60)

2. On August 13, 1958, Local 248 called a meeting and conducted a vote which was then described at the meeting by union officials as a "vote of confidence." (R. 64, 67) At this meeting union officials expressly assured the persons in attendance that the vote was *not* a vote for strike action, and that *before* strike action was taken this question would again be referred to the membership. (R. 64, 67) In November, 1958 Local 248 reaffirmed by means of a written negotiations bulletin the oral statements made at the August 13, 1958 meeting as follows:

"BLANK CHECK STRIKE AUTHORITY
"This is a good example of the 'Big Lie'. The
membership of Local 248 did NOT give ANY-
ONE. a blank check! The minutes of the
August 13th Strike Vote will bear this out.
President Merten told the membership, at this
meeting, that before strike action was taken the
members would be called together to make the
decision.

"Further—The International Executive Board
CANNOT CALL A STRIKE! They can au-
thorize only: THE LOCAL UNION MEM-
BERSHIP will be given the opportunity to
make the final decision." (R. 78)

Despite these oral and written representations, the union leadership declared a strike to commence at 11 A.M. on February 2, 1959, and without a prior vote. (R. 68) At a membership meeting immediately following the commencement of the strike, a microphone was cut off when a member attempted to speak from the floor. (R. 69)³

3. A guide as to why the union fined these employees rather than expelling them from the union may be found in the remarks of the Union counsel at the hearing before the Board Trial Examiner:

"MR. RASKIN: Now we know and we are not naive about these matters, that where there are requirements for union membership as the condition of employment, unfortunately and that even is true where there are no requirements of union membership as the condition of employment — unfortunately the great mass

³ An earlier Allis-Chalmers proceeding before the Board reviewed the types of problems sometimes faced by employees in union strike votes:

"At the West Allis plant Local 248 of the United Automobile Workers Union, C.I.O. (UAW) was recognized by the Company in 1937. The evidence here is that thereafter dictatorial control, undemocratic practices, and subversive aims of the local's leadership deprived the rank-and-file of genuine trade union representation and effective voice in the local's affairs. The testimony is that a bitter strike in 1941 was, at least in part, in pursuance of and a result of these aims and practices of the leadership. There were other abuses, as well.

"The Wisconsin Employment Relations Act required a favorable vote by employees before calling of a strike. A vote was taken by Local 248 officers prior to the 1941 strike and the result announced as overwhelmingly in favor of striking. In a subsequent investigation, however, the Wisconsin Employment Relations Board found that there had been wholesale forgery of ballots and directed a new strike election.

"In 1946, during contract negotiations, another strike vote was taken by Local 248, and announced as carried, under circumstances which, the evidence indicates, cast considerable doubt on the probity of the stated result. Ultimately that strike was terminated by the execution of a new contract."

106 NLRB 939, at 958.

of workers take little interest in union affairs. This unfortunate situation probably is no different than in any other fraternal group. The attendance record at membership meetings is low. The great interest in keeping alive the union status is maintained usually by a handful of people. Therefore the imposition of a sanction such as, 'You are no longer a member of this union,' means nothing and is of no consequence and probably could well be a relief to some people because it wouldn't make it necessary for them even to so much as come up to a union meeting at all." (R. 1)

QUESTION PRESENTED

Whether a union which threatens to fine and fines employees who are members of such union for refraining from engaging in an economic strike by working for the employer during such strike, and institutes court action to collect such fines, thereby restrains or coerces employees in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act.

ARGUMENT

I

INTRODUCTION AND SUMMARY

In this case the National Labor Relations Board and the intervening union urge that unions, by threat of confiscatory fines, may coerce individual employee-members into abandoning rights guaranteed by the National Labor Relations Act.

Congress did not give unions such authoritarian power nor should unions want it. Congress expressly protected

employees against such coercion. This was the whole purpose of the Taft-Hartley amendments which introduced into our labor laws the concept of *union* unfair labor practices infringing upon *employee* rights.

As the majority below stated (R. 103):

"Study of the Taft-Hartley legislative history as a whole reveals a clear Congressional intent to balance the national labor policy by placing limitations on coercive union conduct similar to those previously prescribed for employers."

In this case the right involved was that of refraining from striking. In other recent cases the right involved was that of producing up to one's capacity in violation of unilateral union production ceilings.⁴ Other recent cases involve the right of resorting to the processes of the Act.⁵ Whatever the right involved in a particular case, the exercise of the statutory right by the employee must be protected from union coercion.

Here the threatened fine was a confiscatory \$100 per day. The evil, however, is not to be measured, as the union contends, by the amount of any fine ultimately imposed. Where the coercive threat (which must be measured at the time it is made) accomplishes its intended purpose and the individual abandons the exercise of the subject right, no fine ever results. The coerced abandon-

⁴Local 283, *Auto Workers (Wisconsin Motors Corp.)*, 145 NLRB 1097, petition for review pending, 7th Cir.; *Bay Counties District Council of Carpenters (Associated Home Builders)*, 145 NLRB 1775, remanded for further proceedings, 352 F. 2d 745.

⁵Local 138, *Operating Engineers (Charles S. Skura)*, 148 NLRB 679; *Roberts, H. B., Business Manager of Local 925, Operating Engineers (Wellman-Lord Engineering, Inc.)*, 148 NLRB 674, enforced *sub nom. Roberts v. NLRB*, 350 F. 2d 427.

ment becomes a quietly accomplished fact and there the matter ends.

The elements of the statutory violation here are, in every respect, obvious, and are indeed conceded by the Board. It is well established, and acknowledged: that Section 8(b)(1)(A) is not restricted or limited to any specific category of activity so as to exclude employee rights at times of economic strike; that union fines generally, and these particularly, are coercive; that the protection of the statute extends to union members as well as non-members; and that working during an economic strike is a Section 7 protected activity. See pp. 13-17, *infra*.

In the face of this, the inexorable conclusion is that the union coercions in this case were a clear violation of the statute. To avoid this conclusion the Board offers only the diffuse reply that the statute is aimed "primarily" at violence and threats of job loss, "principally" in organizing campaigns, and the unpersuasive negative proposition that it is not shown that Congress intended to restrict such "traditional" union techniques as fining. The unavoidable, and logical consequence of the concessions made as to the well-settled elements of this offense cannot so blithely be avoided.

The majority decision of the National Labor Relations Board, as well as the dissenters below, reveal a common refusal to accept the law as enacted because of policy considerations as to what in their view it ought to be.

The Board and Union would interpret the statute as though its purpose were to secure to unions some guarantee of effectiveness in concerted activities, and some assurance of advancement of union-determined goals through the vehicle of a close-ranked membership even though at the expense of each member's option to re-

frain from any or all concerted activities. See pp. 17-23, *infra*.

This is an unsupportable negation of the Congressional purpose in enacting Taft-Hartley, which in its object and every amendment subordinated the interests of the union as an entity to the interest in protecting the free exercise of individual options from intimidating union coercion.

Policy arguments advanced now by the Board were expressly advanced in the legislative debate, for example by Senator Pepper, a leading spokesman for these views. These arguments were directly rejected by Congress. Pursuing the example, Senator Pepper voted with the minority on every significant vote. See p. 18, *infra*.

The majority below did not feel so free to ignore the fundamental policy decisions that had evolved from an intensive legislative struggle:

"If the Congress did not mean to say what Congress has so clearly said, then Congress itself must indicate that fact by legislative enactment. This Court should not attempt to change the plain wording of this statute by judicial interpretation." (R. 103)

In their resort to the legislative history the Board and the dissenters below lost sight of the forest because of the trees. They would have us believe that a Congress intent on balancing the national labor policy

- carefully locked the front door by preventing unions from using threat of job loss as a means for coercing membership subservience, but deliberately left the back door wide open by permitting threat of a confiscatory fine potentially many times daily earnings.
- outlawed the more blatant physically violent form of coercion against crossing the picket line and working, but permitted the more sophisticated but equally

— if not more — effective form of coercion of a confiscatory fine threat.

Ascribing such shallow exercises in futility to a very determined Congress is quite unrealistic. The whole range and tone of the legislative history confirms the intent of Congress to eliminate repressive union tactics against employees exercising their right to refrain from particular union activities. See pp. 24-29, *infra*.

Senator Taft made this crystal clear in the debates when he said :

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' " Leg. Hist. 1206

The Board departs from the clear language and purpose of the statute in favor of its own views on certain policy questions. Yet these same views were debated and rejected by Congress and the Board has utterly failed to demonstrate why they should be resurrected here. The issue of policy here can be stated simply. The individual employee seeks to exercise the right recognized by Congress to work when he chooses. The union claims the privilege of overriding this fundamental individual choice through coercive fines that compel obedience regardless of the consequences to the individual. The sole justification claimed for such a drastic privilege is the

interest in preserving union solidarity. Yet there has been no showing that such a drastic technique is necessary or even appropriate to accomplish this purpose.⁶ Nor has there been a showing that this objective justifies overriding the basic right of the individual to earn a living as he chooses.⁷

The majority below is supported by decisions in other circuits. In *Leeds & Northrup Co. v. NLRB*, 357 F. 2d 527 (1966) the Court of Appeals for the Third Circuit said:

"But to equate union fines with total wages earned by a non-striking employee is the grossest form of economic coercion affecting not only the union membership status but also the relationship between the employee and his employer in violation of the Act. Such economic coercion is calculated in design and effect to force an employee to act in concert with the union in future labor-management strife." 357 F. 2d at 536.

See also *Associated Home Builders of the Greater East Bay, Inc. v. NLRB*, 352 F. 2d 745 (1965) where the Court of Appeals for the Ninth Circuit analyzed the problem of union fines consistently with the approach adapted by the majority here but where the case turned on a different section of the statute.

The Court of Appeals for the District of Columbia has likewise found union fines to be violative of Section 8(b)(1)(A) of the Act. *Roberts v. NLRB*, 350 F. 2d 427 (1965). See pp. 29-31, *infra*.

⁶See the careful analysis of the policy issues of this case in 80 Harvard L. Rev. 683 (Jan. 1967).

⁷Compare the recent decisions of this court confirming the supremacy of individual rights over the compulsion of a governing majority in the fields of criminal procedure and racial discrimination.

With respect to the consequence of the union shop agreement, the argument is now put forward that full union membership with subservience to all union policies is in no way required of employes, particularly not by union shop agreements. This position is directly contrary to the position the unions have previously asserted against the employes here involved.

Historically the unions involved in this case have taken the position that the union shop agreements here do require full union membership. This position was theirs when the subject union shop agreements first became effective in 1955. This view was pressed by the unions in the state court pilot suit to establish a right to collect the fines. It is only now, at this late date, that the argument is advanced that something less than full membership is all that has ever been required. In any event, the stipulation in this case is that all employes were union members pursuant to the union shop agreement. (R. 26)

Whatever the consequence of the union shop agreement, there is no warrant for the view that a union member, whether "voluntary" or "involuntary," loses the statutory protection against union coercion. See the excellent analysis of this issue in 80 Harv. L. Rev. 683, 685-687 (Jan., 1967).

To permit coercive union fines where a union shop agreement is in effect would defeat the careful Congressional limitations on compulsory union membership. It would present the anomaly of continuing to recognize the Act's prohibition against threats of job loss for failure to join in a strike, while purporting to justify threats of fines which could confiscate earnings and more. See pp. 31-33, *infra*.

But two points remain, the relevance of certain Labor-Management Reporting and Disclosure Act of 1959 pro-

visions and the Board's and intervening union's concern that the decision below would inhibit union disciplinary action against members engaging in wildcat or unauthorized strikes.

As to the first point, both the Board and the intervening union rely upon the proviso to Section 101(a)(2) in Title I of the L.M.R.D.A. of 1959.

This reliance is misplaced. The proviso is appended to the Act's guarantee of free speech and assembly to union members and has nothing to do with the exercise of rights guaranteed under Section 7 of the Labor-Management Relations Act. This is confirmed by the fact that in both Section 103 of Title I and in Section 603(b) of Title VI of the L.M.R.D.A. of 1959 Congress meticulously spelled out that nothing in the L.M.R.D.A. of 1959 "shall limit the rights and remedies of any member of a labor organization" or "impair or otherwise affect the rights of any person" under the National Labor Relations Act, as amended. See p. 34, *infra*.

The short answer to the second point is that the decision below would in no way prohibit a union in dealing as it might choose with members who participated in a wildcat or an unauthorized strike, since such conduct is not an activity protected by the Act. In any event, the orthodox response to such activity, when required, is employer action. On both points, see, for example, *NLRB vs. Draper Corp.*, 145 F.2d 199 (4th Cir.):

"we are of the opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act. . ." 145 F.2d at 202.

The statute is clear both in its language and purposes. The decision of the Court of Appeals *en banc* should be affirmed.

II

THE BOARD CONCEDES ALL THE ELEMENTS OF THE STATUTORY VIOLATION

The statute prohibits restraint and coercion of an employee in the exercise of a Section 7 right. A union fine is clearly coercive and the right to refrain from a strike is the exercise of a Section 7 right. The violation is apparent and the Court below so found:

"If Congress did not mean to say what Congress has so clearly said, then Congress itself must indicate that fact by legislative enactment. This Court should not attempt to change the plain wording of this statute by judicial interpretation." (R. 103)

The Board, however, would have us ignore the plain meaning of the statute and turn solely to their strained reconstruction of legislative history and policy. The statute cannot so easily be ignored. As this Court said in *Local 1976, United Brotherhood of Carpenters & Joiners of America AFL v. NLRB*, 357 U.S. 93:

"The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this court's. . . . Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from

which the court must extract the meaning most appropriate." 357 U.S. 93 at 100.⁸

The Board has quite obviously turned to its policy arguments because it has been forced to concede all the elements of the statutory violation. And yet having conceded all the elements the Board concludes that there has been no violation. Such a result cannot be sustained.

The Board briefly contends for a restrictive view of Section 8(b)(1)(A) based upon *National Labor Relations Board v. Drivers Local No. 639 (Curtis Bros.)*, 362 U.S. 274.⁹ But the Board acknowledges that 8(b)(1)(A) is not limited to organizational tactics or violence but that it can reach broadly into a variety of other matters. See Brief for the Board, p. 9, footnote 9; p. 25, footnote 15.

Further, the Board concedes that union fines are by nature coercive and may constitute restraint and coercion within the meaning of Section 8(b)(1)(A). See Brief for the Board, p. 8, footnote 8; p. 33, footnote 24.¹⁰ Surely

⁸ This case is also highly significant for its resolution of the tension between specific statutory guarantees and conflicting private agreements. With respect to the effect of hot cargo agreements upon the secondary boycott regulation under Section 8(b)(4)(A) the Court held that the statute guaranteed freedom of choice at the time of a concrete situation calling for the exercise of judgment on a particular matter of policy notwithstanding a prior conflicting collective bargaining agreement. See 357 U.S. 100, 105-106. Similarly, here the preexisting general union membership obligation in no way restricts the freedom of choice guaranteed by the statute at the time a concrete decision is faced whether to join in or refrain from specific concerted activities.

⁹ Even the most restrictive reading of the *Curtis* case does not support the Board argument, for that decision specifically recognized that Section 8(b)(1)(A) reached "particularized threats of economic reprisal." 362 U.S. at 287. The majority below relied upon this construction. (R. 100)

¹⁰ The coercive nature of union fines has also been established by decisions interpreting §8(b)(4)(A) of the Act. Building and Construction Trades Council of Los Angeles, 162 N.L.R.B. No. 55.

there can be no dispute as to the coercive effect of the threatened fine of \$100 per day disclosed by the record here.¹¹

The Board further concedes that union members as well as non-members are protected against coercion under Section 8(b)(1)(A). See Brief for the Board, p. 30, footnote 19. Senator Taft specifically highlighted this point in the debate on Section 8(b)(1)(A) when he said:

"If there is anything clear in the development of labor union history in the past ten years, it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The Bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders. Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment proposed by the Senator from Minnesota. [Section 8(b)(1)(A)]" Leg. Hist. p. 1028.

¹¹ The union brief attempts to minimize the extent of the coercion, but it has long been established that the Act is concerned with the tendency to coerce and not specific evidence of coercion. "It is immaterial that this conduct failed to deter the non-striking employees from returning to work. It was reasonably calculated to accomplish that end, and its inefficacy in this particular instance is no defense to the charge that it was violative of the Act." *International Longshoremen's & Warehousemen's Union*, 79 NLRB 1487, 1505. "That these tactics may have been ineffective in restraining non-striking employees from exercising the right to work if they so desired does not render the conduct any less violative of the Act." *Local 761, International Union of Electrical, Radio & Machine Workers*, 126 NLRB 123, 125. Moreover, the union claim that the coercion is eliminated because of the availability of court review proceedings conveniently ignores the fact that the state courts have upheld the enforcement of such fines. The availability of the state court collection process, far from eliminating coercion, in fact is a major element in making the coercion effective.

Thus there can be no support for the view that by joining the union the employee has somehow diminished his statutory right.¹²

Finally, the Brief for the Board concedes that union members who work during a strike are exercising a protected right under the Act:

"If the Union had attempted to prevent the defecting members from crossing the picket line by threatening them with physical harm or with a loss in employment benefits (after the strike ended), the Union would have violated Section 8(b)(1)(A)." Brief for the Board, p. 30 and cases there cited.

This right is too firmly settled to be disputed. As Senator Taft observed in his analysis of the conference agreement on the Act:

"[T]he House conferees insisted that there be express language in Section 7 which would make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." Leg. Hist. 1623.

Nor does the protection of this right in any way interfere with the right to strike which is guaranteed by the Act. Senator Taft expressly covered this point during the debates on Section 8(b)(1)(A) when he said:

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to

¹² It is thus clear that an employee who joins a union but exercises his right to refrain from striking is not seeking to join the union "on his own terms" as claimed by the union and the Board. He is, rather, joining on the terms guaranteed by Congress, namely, that in joining the union he may still retain the right to refrain from a strike and work at his regular job.

work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them; but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' . . . Mr. President, I can see nothing in the pending measure which as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." Leg. Hist. 1206-1207.¹³

The Board has conceded, as it must, that all of the elements of the statutory violation are present. The violation must be found.

III

NLRB VIEWS OF POLICY MAY NOT OVER- RIDE THE POLICY DETERMINATIONS MADE BY CONGRESS

The brief for the Board, while making a passing gesture at statutory analysis and legislative history, devotes its major thrust to questions of political policy. Throughout the argument we find repeated concern for the strength, effectiveness and vitality of labor unions. The virtues of majority rule are extolled without regard to the rights of the minority or the individual. The philosophy ex-

¹³ This legislative history has already been adopted by this Court in *N.L.R.B. v. Drivers, Local No. 639 (Curtis Bros.)*, 362 U.S. 274.

pressed is that the security of the union is the goal of national labor policy and that employees should be subject to union control requiring them to behave in the manner which best furthers the purpose of the union.¹⁴

The policy arguments advanced by the Board were also advanced in the legislative debates. Senator Pepper was a leading spokesman for the view that unions should and must have the power of coercion over their members. During the debates he stated, for example:

"We must balance one side against the other. By what policy do we do the greater good? My position is that it is necessary for the union to have some discipline if it is to be an effective organization to defend and protect the workers. . . . Remember that the worker is protected by the union's constitution and by-laws. Remember that the worker is presumed to have had a fair trial by his peers in the union." Leg. Hist. 1094.

But the philosophy expressed by Senator Pepper was overwhelmingly rejected by Congress. Senator Pepper was a member of the minority on every significant vote including in particular the adoption of Section 8(b)(1)(A). Leg. Hist. 1217. Now the Board has revived the philosophy which Congress has rejected.

¹⁴ The long-term strength, effectiveness and vitality of labor unions is undoubtedly better served if unions accomplish their purposes by persuasion (as permitted by Congress) rather than by coercion (as prohibited by Congress). When a union attempts to coerce employees into striking when they wish to work, it diminishes its strength and effectiveness and risks loss of its position as majority bargaining representative. Thus even if it were accepted that Congress sought to guarantee union security even to the extent of denying the right of an individual to work, there is reason to believe that the coercive union tactics shown here would hinder rather than further this purpose. As the Court below observed, "It is more important for the individual laboring man to be free and for his labor organization to be free than for any other segment of our society." (R. 102)

The Board has no authority to make such policy determinations. It is not the arbiter of the legislative policies underlying the Act. As this Court admonished the Board in *American Shipbuilding Co. v. NLRB*, 380 U.S. 300:

"... the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." 380 U.S. at 310.

It is Congress and not the Board which has established the policies of the Act. This Court has identified those policies which are most relevant to the dispute here:

"It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed upon employers with respect to violations of employee rights." *International Garment Workers Union AFL-CIO v. NLRB*, 366 U.S. 731, 738.

"This legislative history clearly indicates Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers v. NLRB*, 347 U.S. 17, 41.

"[the purpose of Section 8(b)(1)(A) was] the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal." *NLRB v. Drivers, Local Union No. 639*, 362 U.S. 274, 286-7.

It is these policies which the Court below identified and applied. These policies lead inescapably to the conclusion that the coercive union fine imposed upon a member for exercising his statutory right to work during a strike constitutes an unfair labor practice under the Act.

The Board emphasis upon the union strike vote procedures and the alleged majority rule is of no assistance

in interpreting the Act.¹⁵ The statute applies to all unions and all employees. It does not distinguish between unions following one procedure or another or between strikes which are called in one particular manner or another. Rather it assures to employees the free choice whether to work or not to work regardless of what procedures are followed by a union in calling a strike and regardless of what the purpose of the strike may be.¹⁶ The statute recognizes that the only effective means to assure that union action is responsive to the will of those it represents, is to guarantee to each employee the free

¹⁵ To equate a union strike vote with "majority rule" is the height of naivete. A typical strike vote is not a secret ballot election based upon a full and fair exposition of *both* sides of the question. Nothing in the existing labor laws guarantees that a strike vote must be held and nothing guarantees that if a vote is held, it will be conducted in a manner which truly permits the employees to express a reasoned decision. On the contrary, the law leaves this question solely to the internal union procedures and it is illegal for an employer to insist that a secret ballot strike vote be held during bargaining negotiations. *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

¹⁶ The excessive significance which the Board attributes to the strike vote ignores a critical element of timing. A strike vote is often nothing more than a show of strength during bargaining negotiations and may come long before the actual strike. (Compare the record here, R. 64, 67, 77-78.) Here the so-called strike vote of the members was merely an authorization for the leadership to call a strike later as bargaining progressed, and the actual strike came months later. (R. 72) The fact that a majority of employees may favor a strike before it is called is no justification for coercive fines to bind them irrevocably to a strike subsequently called by the union leadership, especially where the strike drags on for a lengthy period and circumstances change. Once having voted to strike the employees have no guarantee that they will have a chance to vote to terminate the strike unless their leaders so permit. A pre-strike vote offers flimsy justification for coercive fines designed to keep an employee from returning to work regardless of the length of a strike, his personal needs, or the risk that he will be permanently and lawfully replaced and lose his job.

choice whether to join or refrain from each particular concerted activity.¹⁷

The Board argument would subordinate the rights of the individual to the power of the organization. The fallacy of this approach was well expressed by Professor Archibald Cox as follows:

"The state alone cannot achieve true union democracy but it has much to contribute. Preserving democracy requires protecting individual and minorities against numerical majorities or an officialdom which acts with the majority's consent. It is not enough to put our trust in self-restraint."¹⁸

The concern expressed by the Board for rights of the union as an entity goes far beyond the protection expressed by the legislative scheme. Congress granted rights not to labor unions but to employees. Section 7 of the Act guarantees to employees the right either to engage in or refrain from "any or all" concerted activities. Section 8(b)(1)(A) was not enacted to further the effective functioning of the union but rather to protect the exercise of statutory rights by employees from restraint and coercion by labor unions.

The notion that the Taft-Hartley Act should be construed with regard for what makes a labor union a more "effective" collective bargaining representative is unsound. Extensive hearings had demonstrated that unions have woefully abused the rights of employees, employers

¹⁷ It should be noted that the record does not support the claims made as to the procedures followed by the union in calling the strikes. The record is silent as to certain of the strikes and the state court trial record as to one of the strikes makes it clear that there is substantial dispute as to the propriety of the strike vote procedures on that occasion. See Statement of the Case, pp. 3-4, supra.

¹⁸ Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 830 (1960).

and the public. This legislation sought to cure these abuses.

In a practical sense, the provisions of the Taft-Hartley Act made unions less effective bargaining agents. Obviously unions were more "effective" when they were free to coerce employees, when they were free to cause employers to discharge members no longer in good standing, when they had no obligation to bargain in good faith and when they were free to engage in unlimited secondary boycotts. The Taft-Hartley amendments sought to cure these abuses and this purpose must be controlling when the Act is interpreted.¹⁹

Congressional concern for the rights of the individual was not misplaced. Under the principle advocated by the Board an employee would face an intolerable dilemma. He may wish to refrain from a strike, either at the outset or later as circumstances change, for a variety of perfectly good reasons ranging from overwhelming personal financial problems to distrust that the union leadership was advancing personal political motivations or even subversive interests, a concern over mishandling of the strike vote procedure or simply a belief that there was no economic justification for the strike.²⁰ If the employee

¹⁹ Organized labor boycotted the Taft-Hartley hearings and labeled the legislation a "slave labor act." The President vetoed the Act and yet Congress persisted in its purposes to balance the national labor policy by prescribing limitations on union conduct in a manner already prescribed for employers and to outlaw union coercive techniques aimed at individual employee subservience. Against this background the Board now purports to find in the Act a Congressional purpose to give unions unlimited power to control employee action through fines.

²⁰ This Company is not unacquainted with such problems. From 1941 and throughout World War II many of the Company employees fought a bitter battle with a union leadership which continually thwarted the will of the members through a variety of devices including voting frauds that were ultimately reversed in the Courts. *Allis-Chalmers Workers' Union, Local 248 v. Wisconsin Employment Relations Board* (Wisconsin Circuit Court, 1941) 4 Labor Cases ¶60, 429. See also, Statement of the Case, p. 4, n. 3, *supra*.

goes on strike, he may be permanently replaced by his employer and lose his job,²¹ but at the same time the threat of coercive union fines which far exceed wages to be earned prevents him from going to work regardless of whether the strike is justified or unjustified and regardless of his need.

Congress knew that an employee could be forced to pay dues to a union to hold a job under a union shop agreement. Congress knew that universal union democracy was a yet unattained future goal. Congress knew that union leaders sometimes called and maintained strikes for reasons other than the best interests of their members, sometimes even deliberately to obstruct the free flow of commerce the Act seeks to foster. Congress knew that the law did not even require membership approval of a strike, and that even when unions purported to take strike votes there were often no opportunities for opponents of the leaders, even if a majority, to speak, to vote by secret ballot, or to determine the true outcome of the vote. Congress knew that every strike was not a holy crusade but that the best interests of the employees might be lost in the clash of competing unions and employers.

Knowing all these things Congress did not leave the individual defenseless. Congress said clearly and unmistakably in Section 7, Section 8(a)(3) and Section 8(b)-(1)(A) that except for union shop dues obligations an employee may refrain from any and all concerted activities and that no union could coerce him for doing so.

²¹ *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333.

IV

THE LEGISLATIVE HISTORY CONFIRMS THE NATURAL MEANING OF THE STATUTE AS ENFORCED BY THE COURT OF APPEALS

The basic thrust of Section 8(b)(1)(A) has been reviewed above. And, as has been shown, the legislative history, as interpreted by this Court, confirms the intention of Congress to eliminate repressive union tactics aimed against employees who refrained from particular union activities.

The statute broadly proscribes all forms of restraint and coercion and no attempt was made to itemize particular forms. Nevertheless there is specific evidence that union fines were considered by Congress. In the final debate on the Act, Senator Wiley stated that the law was necessary and cited a number of abuses including the following:

"There are instances in which unions, because we have allowed them to do so, have imposed fines upon their members up to \$20,000 because they crossed picket lines—dared to go to the place of employment." Leg. Hist. 1471.

Moreover, during the hearings on the Taft-Hartley Act, Senator Ball, one of the proponents of Section 8(b)(1)(A) introduced into the record a number of letters complaining about union fine tactics and this portion of the record was specifically considered in the Senate Committee Report. Leg. Hist. 413.²²

²² See Hearings before the Committee on Labor & Public Welfare, U.S. Senate 80th Congress, First Sess., on S. 55 and S.J. Res. 22, pp. 2066-2069.

Letter from Mrs. Alice Gilmartin, 1334 Sellers Street, Philadelphia, Pa.

"... I have been there for 2 years and have never had cause to be

Fines covered by Section 8(b)(1)(A) are not exempted by the proviso to that section. The proviso by its terms relates only to "acquisition or retention of membership." The legislative history of the proviso confirms that it had this limited purpose. In introducing the proviso Senator Holland confirmed that it was directed at "that part of the internal administration which has to

dissatisfied in any way with the firm's head or foreman, but we are always going out on a strike or walkout or just talking. Now I refused to go on a strike and do picket duty so they sent me a letter to pay them \$100 and that I was also expelled from union. Later the shop steward came to me and said if I agreed to pay the \$100 I would be squared and even, and that they would take a little each week out of my pay . . . I am a widow with children and a home to support . . . I intend to fight until I cannot fight anymore. Just imagine paying someone so you can work for someone else and then have them order you out on a strike and fine you \$100 because you refuse to do their bidding . . ."

Letter from Mr. R. B. Nichols, The Tarring Co., South Bend, Ind.

" . . . We have just concluded a lengthy strike . . .

"During the strike period, the union levied fines on all members who refused to picket, with the result that several workers had fines of over \$100 per person which, when the strike was concluded, the union insisted they pay or sign notes to pay. Unfortunately, there are certain ex-servicemen involved in this matter who refuse to pay the fine, so cannot obtain clearance from the union and, therefore, will not be allowed to enter the plant.

"Can you visualize the hullabaloo that would be raised should an employer attempt to keep an employee from his job, particularly an ex-serviceman, and yet the union is perfectly free to resort to such tactics without interference . . ."

Letter from Mr. George S. Ward, Harlan, Ky.

" . . . In our contract with the Mine Workers there is a clause which sets up an arbitration board to handle all disputes . . . but it is becoming increasingly difficult for the employer to place a witness on the stand in his behalf, for the reason that the Mine Workers, I am informed, have notified all their members that they must not testify for the employer, and if they do, they are immediately fined \$25.

"I know of one such instance where a former checkweighman was fined \$25 by his local for testifying for the company, and in another instance a motorman testified for the company and he was cited to appear before the local union but instead he just quit his job."

do with the admission or the expulsion of members." Leg. Hist. 1139. He further stated:

"In other words, if accepted by the sponsors of the pending amendment, the inserted words would make it clear that the pending amendment would have no application to or effect upon the right of the labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." Leg. Hist. 1141.

During the debate on the union shop provisions concern had been expressed that the new provisions would interfere with the right of unions to select their own members. Senator Taft answered these fears as follows:

"Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say, You have got to fire this man because he is not a member of our union." Leg. Hist. p. 1096.

The legislative history and congressional purposes in this area are comparable to those reviewed in great detail with respect to the Railway Labor Act in the case of *International Association of Machinists v. Street*, 367 U.S. 740.

When the debate turned to Section 8(b)(1)(A) there was concern that the proposed amendment could reverse these commitments which had been made as to a union's right to select its own members. It was to prevent such an interpretation that the proviso to Section 8(b)(1)(A) was introduced by Senator Holland. This purpose of the proviso is highlighted by the following debate which immediately followed the introduction of the proviso:

"Mr. Pepper: Am I correct in assuming that it is the interpretation of the senator from Ohio and

the senator from Minnesota that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?

"Mr. Ball: Absolutely not. If the union expels a member of the union for any other reason than non-payment of dues, and there is a union shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, and for any reason."
Leg. Hist. 1142.

It is thus clear that the proviso was limited solely to questions of beginning and termination of union membership. Nothing in the legislative history of the proviso suggests that it was intended to validate union fine procedures. The Board itself in *Marlin-Rockwell Corporation*, 114 NLRB 553, 561 said:

"As we read the 8(b)(1)(A) proviso, its sole purport is to guarantee to unions the privilege, as a voluntary association, to determine both who shall be a union 'member' and what substantive conditions

a 'member' must comply with in order to acquire or retain union membership status."

Cases such as *International Typographical Union (American Newspaper Publishers Association)*, 86 NLRB 951 and *NLRB v. UAW*, 320 F. 2d 12 add nothing to the clear language of the proviso. Both deal with matters of membership status, the first a rule as to expulsion and the second a rule as to resignation from membership. Neither case has any bearing on the problem of union fines.²³

Union rules as to admission or expulsion of members have a limited scope. They are internal regulations which determine who may participate in union affairs. Court collectible fines reach beyond this internal relationship and seek to bind the individual to all union policies.

Congress accepted the view that a union did not have to extend the privileges of membership to those it found unacceptable but Congress gave no authority to unions to control the actions of members through unlimited

²³ A union fine as such was involved in one earlier case. In *Minneapolis Star & Tribune Co.*, 109 NLRB 727, the Board gave little attention to the union fine issue and summarily adopted an interpretation by the Trial Examiner which was based upon a gross distortion of the legislative history. It is significant that there was no suggestion in that case that the fine was judicially collectible or enforceable in any manner other than possible expulsion, and the Board rested its decision solely on the authority of the *I. T. U.* decision which as noted above was an expulsion case. The *Minneapolis Star* concept can be distinguished on the ground that the fines there were imposed for failure of a member to perform picket duties and attend union meetings. It may be argued that once a member has elected not to work, the question of picket duty and attendance at meetings is solely a matter of his obligations to the union and has no impact on his employment relationship. Since the Act as a whole deals with the employment relationship, it may be argued that the Section 7 right to refrain from concerted activities extends only to those activities such as striking or not striking which have an effect on the economic incidences of the employment relationship but does not extend to private obligations between the member and the union which do not affect employment as such.

financial sanctions.²⁴ Expulsion from the union is the only remedy consistent with the congressional purpose.²⁵

V

DECISIONS OF OTHER COURTS OF APPEALS SUPPORT THE DECISION HERE

The briefs for the Board and the union review numerous Court decisions dealing with issues peripheral to the central controversy here. More significant are the

²⁴ The argument that Congress must have permitted fines because it permitted expulsion is based upon the false premise that Congress permitted expulsion so that unions could control their members. There is no evidence of such a congressional purpose. Congress was concerned primarily with rights of individuals and conceded to unions, not union control of members, but only union authority to choose members and to remove dissidents from the union ranks. Congress simply acknowledged that unions would not be forced to accept or keep members they didn't want. Moreover, there is a distinct difference in quality between coercive fines and possible expulsion. When faced with the threat of a judicially enforceable fine of \$100 per day an employee is left no reasonable choice. On the other hand, when faced with expulsion he may weigh the benefits of union membership against the benefits of working during the strike and make a free choice. In the argument before the Trial Examiner the counsel for the union candidly admitted that loss of membership may not be an effective sanction and that fines were. (R. 1) The Board itself has recognized that as to employees in certain circumstances "... loss of membership was of no significance to them; consequently their expulsion from the union could hardly be an effective deterrent ...". *Tawas Tube Products, Inc.*, 151 NLRB 46, 49.

²⁵ As noted above, the Board has conceded that the proviso has no application to union fines in cases such as *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679. More recently the Board has held the proviso inapplicable even to a union expulsion. *Cannery Workers Union (VanCamp Seafood Co.)*, 159 NLRB No. 47. Thus the Board has abandoned any pretense of interpreting Section 8(b)(1)(A) and its proviso with reference to the union tactics involved. Rather, the Board looks to the purpose of the union coercion as the sole determinant. Such an approach totally abandons any reference to the statutory language.

three recent decisions of other Courts of Appeals which have considered the legality of union fines under Section 8(b)(1)(A) and have reached decisions in harmony with the decision of the Court of Appeals here.

In *Robertis v. NLRB*, 350 F. 2d 427 (1965) the Court of Appeals for the District of Columbia ruled that an unfair labor practice under Section 8(b)(1)(A) had been committed where a union imposed a fine upon a member because that member had previously filed NLRB charges with respect to another matter. This ruling of the Court of necessity confirms that a union fine is a coercion within the meaning of the statute, that the exercise of a statutory right is protected against such coercion, and that membership in a union does not deprive an individual employee of the statutory protection against this form of coercion.

More recently the Court of Appeals for the Third Circuit considered this issue in the case of *Leeds & Northrup Company v. NLRB*, 357 F. 2d 527 (1966). In ordering the Board to conduct a full hearing on all issues including questions of union fines, the Court made the following comment concerning union fines imposed upon employees who refrained from a strike:

"But to equate union fines with total wages earned by a non-striking employee is the grossest form of economic coercion affecting not only the union membership status but also the relationship between the employee and his employer in violation of the Act. Such economic coercion is calculated in design and effect to force an employee to act in concert with the union in future labor-management strife. Congress has imposed strict limitation on compulsory unionism, and the Supreme Court has determined the obligation of union membership to be confined solely to the payment of dues." 357 F. 2d at 536.

Another variation of the same theme is found in the decision of the Court of Appeals for the Ninth Circuit in *Associated Home Builders of the Greater East Bay, Inc. v. NLRB*, 352 F. 2d 745 (1965) dealing with the validity of union fines imposed upon employees for alleged violations of a union-imposed rule limiting individual productive output. While the Court ultimately left the Section 8(b)(1)(A) issue unresolved in favor of a different approach to the problem, its extensive review and analysis of the problem is consistent with the approach adopted by the Court of Appeals for the Seventh Circuit in the instant case.

VI

THE EXISTENCE OF THE UNION SHOP AGREEMENT HEIGHTENS THE CO- ERCIVE EFFECT OF THE UNION ACTION

Whether or not a union shop exists an employee retains the freedom of choice guaranteed by Section 7. As demonstrated above, a union member is protected against the coercion of union fines whether he is a "voluntary" or an "involuntary" member.²⁰ However, the existence of a union shop agreement with its requirement of financial support increases the pressures on the employee to join the union and Congress expressly limited coercive misuse of this device.

In the case of *Radio Officers v. Labor Board*, 347 U.S. 17 this Court ruled that the protection of the Act extends not only to the question of joining or not joining the union, but also permits employees to be "good, bad or indifferent members." 347 U.S. at 40. With particular

²⁰ The fallacy of the supposed voluntariness of union membership and the irrelevance of this concept to a resolution of the present issues is well analyzed in 80 Harvard L. Rev. 683, 685-687 (Jan. 1957).

reference to the effect of union security agreements the Court said:

"This legislative history clearly indicates Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." 347 U.S. at 41.

The approach of the Board would have the anomalous result of permitting the union unlimited power to coerce members by confiscatory fines, while at the same time the Board recognizes that the statute prohibits union coercion of membership subservience under a union shop by threat of job loss or any other detriment to the employment status. The congressional safeguards upon compulsory unionism cannot so easily be bypassed.²⁷

The union contends that the union security agreement merely required the payment of dues and initiation fees and that the employee was not compelled to take the ill-defined further steps which would make him a "member" subject to the union fine power. Such a contention is far

²⁷ The Board here finds no illegality despite the crushing economic impact of a threatened fine of \$100 per day and yet the Board has repeatedly found violations of Section 8(b)(1)(A) in relatively minor economic impairment of incidental employment benefits including necessity for physical exams, rights to changes in shifts, and timing of payment of wages (*J. J. Hagerty, Inc.*, 139 NLRB 633), reduction of seniority (*Minneapolis Star and Tribune Co.*, 109 NLRB 727), standards in establishing seniority (*Pacific Intermountain Express Company*, 107 NLRB 837), right of promotion (*Bell Aircraft Corporation*, 101 NLRB 132; *Local Union No. 450, Operating Engineers*, 122 NLRB 564), right to welfare benefits (*J. J. Hagerty, Inc.*, 139 NLRB 633; *Local 140, Bedding, Curtain and Drapery Workers Union*, 109 NLRB 326; *Indiana Gas and Chemical Corporation*, 130 NLRB 1488; and *Local 229, United Textile Workers of America*, 120 NLRB 1700), protection against demotion (*Bell Aircraft Corp.*, 105 NLRB 755), jurisdiction to perform disputed work (*Rupp Equipment Co.*, 112 NLRB 1315), the right to a leave of absence (*Local No. 13366, District 50, United Mine Workers of America*, 117 NLRB 648), the right to have grievances processed (*NLRB v. Die and Toolmakers Lodge No. 113*, 231 F. 2d 298).

from clear from the applicable precedents. More important, it is a refinement which is undoubtedly lost upon the vast majority of employees who are subject to union security agreements and informed that they must become union members.²⁸

Section 8(a)(3) of the statute speaks in terms of "membership" in a labor organization and the precise limits of this concept have not been settled.²⁹ Whatever may be the obligations of an employee under a particular union security agreement, it is clear that the presence of such an agreement casts doubt on the nature of the membership and Congress prevented the misuse of such a "membership" by protecting employees' freedom of choice to refrain from specific concerted activities. See "Section 8(b)(1)(A) Limitations Upon the Right of a Union to Fine its Members", 115 U. of Penn. L. Rev. 47, 61-63 (November, 1966).

²⁸ It is significant that in the state court collection action the union repeatedly took the position that initiation into full membership was what the collective bargaining agreement required. See R. 55, 58-59. Practical experience would belie any suggestion that a union would freely permit employees to pay dues but refuse other incidents of membership. See also Brief For The New York Times Display Advertising Salesman Steering Committee, *Amicus Curiae*, pp. 13-15.

²⁹ Far from clarifying the limits of compulsory union membership, *NLRB v. General Motors Corp.*, 373 U.S. 734 merely finds that the "agency shop" is within the concept of "membership" required by the statute. The *General Motors* decision finds that the "agency shop" is permitted by the statute but nothing in the decision supports the union claims as to the complete voluntariness of union membership under a union shop agreement.

VII

**THE LABOR MANAGEMENT REPORTING AND
DISCLOSURE ACT OF 1959 HAS NO BEAR-
ING ON THE PRESENT CONTROVERSY**

Both the Board and the union rely upon the proviso to Section 101(a)(2) in Title I of the L.M.R.D.A. of 1959. This proviso is appended to a provision guaranteeing to union members the rights of freedom of speech and assembly. It has nothing whatsoever to do with rights guaranteed under Section 7 of the Labor Management Relations Act. Section 103 of Title I states:

"Nothing contained in this Title shall limit the rights and remedies of any member of a labor organization under any state or federal law or before any court or other tribunal, or under the constitution and by-laws of any labor organization."

Section 603(b) of the L.M.R.D.A. further provides that nothing in the Act should be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act as amended."

The L.M.R.D.A. was enacted to enlarge the protection of union members. It was directed at union abuses beyond those which had been corrected by the 1947 legislation. It supplements and in no way diminishes the force of the Taft-Hartley Act in restricting union coercions which restrain the exercise of employment rights under Section 7.

VIII

THE PROBLEM OF WILDCAT STRIKES IS IRRELEVANT TO THE PRESENT DISPUTE

The union contends that if it is unable to discipline those who refrain from striking it will likewise be unable to control wildcat strikes.³⁰ There is no warrant for such an assumption. The right asserted here to refrain from concerted activities by working during a strike does not imply the same protection for a wildcat strike contrary to union authorization. The right to refrain from a strike is clear from the legislative history and the applicable decisions of the Board and the Courts.³¹ However, wildcat strikes enjoy no such protection. Since wildcat strikes disrupt the free flow of commerce in a manner which Congress sought to prevent, it is established that a wildcat striker is not deemed to be exercising a protected right under Section 7. See Brief for the Board, p. 13.

The wildcat strike is analogous to the problem here only in the sense that in each case individuals are acting contrary to the union dictate. However, this does not establish that in each case the individuals are exercising the same statutory right. Consistent with the purpose to avoid undue obstruction to commerce, Congress recognized the right of the individual to work while others were striking but gave no protection to the individual

³⁰ The union concern for controlling wildcat strikes is specious. Typically, the employer rather than the union disciplines wildcat strikers. In any event the decision here implies no limitation on whatever disciplinary action a union might occasionally take with respect to wildcat strikes.

³¹ The logical consequence of the union position would be that employees who work during a strike are not regarded as exercising a protected right. The contrary has been conclusively established, See pp. 16-17, *supra*.

who sought to strike contrary to union authorization. The decision here implies no change in the established principles applicable to wildcat strikers.

IX CONCLUSION

The statute is clear. Both its language and legislative history confirm that a coercive union fine which inhibits the exercise of the right of an employee to refrain from a strike constitutes an unfair labor practice under the Act. The decision of the Court of Appeals *en banc* should be affirmed.

Respectfully submitted,

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